LIBRARY
SUPREME COURT, U. S.

No. 239 [redacted]

FILED
JUN 13 1969
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

VINCENT COLLETTI and SMILE GUAJARDO,
Petitioners,

vs.

PEOPLE OF THE STATE OF ILLINOIS
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT

JULIUS LUCIUS ECHELES
30 North La Salle Street
Chicago, Illinois 60602
Attorney for
Petitioner Vincent Colletti

JO-ANNE F. WOLFSON
30 North La Salle Street
Chicago, Illinois 60602
Attorney for
Petitioner Smile Guajardo

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

INDEX

	PAGE
Opinion below	2
Jurisdiction of this court	2
Statutory provisions involved	2
Questions presented	2
Statement of the case	3
With respect to the Grand Jury minutes	3
Testimony at trial pertinent to issue	4
The post-arrest statement of Guajardo	4
Reasons for granting the writ	6
1. The prosecutor's suppression of evidence possibly favorable to petitioners	6
2. Colletti's right to confrontation of witness under the Sixth Amendment was violated when his co-defendant's post-arrest statement was permitted in evidence against him over his objections	11
Conclusion	13
Appendix A	
Opinion of the Appellate Court	App. 1

AUTHORITIES CITED

Cases

	PAGE
Brady v. Maryland, 373 U.S. 83, 87 (1963)	7
Bruton v. United States, 391 U.S. 123	12
DeLuna v. United States, 5 Cir., 308 F.2d 140 (1962)	12
Dennis v. United States, 384 U.S. 855 (1966)	7
Giles v. Maryland, 386 U.S. 66 (1967)	7
In re Oliver, 333 U.S. 257, 273 (1948)	9
People v. Aughinbaugh, 223 N.E. 2d 117, 120	6
People v. Derengowski, 213 N.E.2d 618, 619	6
People v. Hopf, 61 Ill. App. 2d 439 (1965)	6, 9

Other Authorities

Section 112-6, Chap. 38, Ill. Rev. Stat. 1965	6
The Criminal Prosecution: Sporting event or Quest for Truth?" by William J. Brennan, Jr.	10fn
Washington University Law Quarterly, June, 1963, pp. 279-295	10fn

In the
Supreme Court of the United States

OCTOBER TERM, 1968

No.

VINCENT COLLETTI and SMILE GUAJARDO,

Petitioners,

vs.

PEOPLE OF THE STATE OF ILLINOIS

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT

Petitioners, Vincent Colletti and Smile Guajardo, pray that a Writ of Certiorari be issued to review the judgment of the Appellate Court of Illinois, Second District, affirming a judgment of the Circuit Court of DuPage County, Illinois, convicting them of robbery and burglary.

Opinion Below

The opinion of the Appellate Court of Illinois, Second District, is reported in 101 Ill. App. 2d 51, 242 N.E. 2d 63, and is reprinted herein as Appendix A.

Jurisdiction of this Court

The judgment of the Illinois Appellate Court, Second District, was rendered on November 8, 1968. A timely Petition for Leave to Appeal to the Supreme Court of Illinois was denied on March 25, 1969. This Petition is filed within 90 days of said order.

The jurisdiction of this court is invoked under 28 U.S.C., Sec. 1257(3).

Statutory Provisions Involved

Illinois Criminal Code, Sec. 112-6, Chap. 38; Ill. Rev. Stat. 1965:

> "Only the State's Attorney, his reporter and any other person authorized by the court may attend the sessions of the Grand Jury. Only the grand jurors shall be present during the deliberations and vote of the Grand Jury. If no reporter is assigned by the State's Attorney to attend the sessions of the Grand Jury, the court, on petition of the foreman and eleven other grand jurors, may for good cause appoint such reporter."

Questions Presented

1. Is not the deliberate policy of the State's Attorney not to record, transcribe or preserve Grand Jury testimony a suppression by the prosecutor of evidence favorable to a defendant? Is not the prosecutor violating and therefore frustrating the holdings by this court in *Brady*

v. *Maryland,* 373 U.S. 83 (1963), *Giles* v. *Maryland,* 386 U.S. 66 (1967) and *Dennis* v. *United States,* 384 U.S. 855 (1966)?

2. Should not petitioner Colletti have been granted a severance from his co-defendant Guajardo when post-arrest statements of Guarjardo implicative of Colletti were permitted, over Colletti's objections, to be considered by the jury in violation of *Bruton* v. *United States,* 352 U.S. 232 (1968)?

Statement of the Case

With respect to the Grand Jury minutes

Prior to trial, petitioners moved for the production of the Grand Jury minutes of the seven witnesses who apparently testified before the Grand Jury. The prosecutor stated, "The State at this time would like to make an announcement that there was no court reporter present or any tape recording device at the Grand Jury." (26)[1]

Petitioners moved to dismiss the indictment, pointing out that since the State's Attorney of DuPage County was held in contempt of court for refusing to turn over the Grand Jury minutes upon another trial judge's demand that "There is a deliberate and steady practice, rule and order of the State's Attorney of DuPage County, not to transcribe the minutes of the Grand Jury proceedings for the purpose solely and only to frustrate the defense from requesting those Grand Jury minutes for the purpose of impeachment at the time when defense counsel is entitled to them" (30). Petitioners made an offer to prove that such was the deliberate and official

[1] Parenthetical number references are to the Transcript of Proceedings filed with this court.

practice of the State's Attorney of Du Page County to the effect that there was an order and direction that the Grand Jury minutes not be written up. On that basis, petitioners moved for dismissal of the indictment because the State's Attorney ". . . is deliberately obstructing the defense in having all relevant evidence present at the trial of the facts under consideration . . ." The motion was denied (34).

The Appellate Court's opinion states, "The State does not contest the sufficiency of defendants' offer of proof . . ." (App. A, p. 6a).

Testimony at Trial Pertinent to Issue

The complaining witness, Nora Birdsong, was robbed and her home burglarized. She testified money was taken from a living room table and that a diamond ring and portable radio also were taken (102-113). Guarjardo, who was found in the house, had no ring, money or portable radio on his person. Colletti, who was arrested some distance from the home, had no ring or radio on his person, nor was any found outside the house or in the immediate vicinity thereof (196-7).

Mrs. Birdsong had testified before the Grand Jury, and in addition, had made a report to a banker wherein she stated that a radio and diamond ring were missing (105-110).

The Post-Arrest Statement of Guajardo

At first, the court sustained petitioner Colletti's objections to questions by Guajardo's attorney asked of the State's witness, police chief Kagann, with respect to post-arrest statements of Guajardo (208).

Later in the trial the court stated, "On further reflection, I am going to overrule myself . . ." (295).

Over objections of Colletti and over his motions for a severance (299), counsel for Guajardo asked officer Kagann for the conversation they had after Guajardo's arrest. Kagann answered, "He [Guarjardo] stated that he was walking along the street and saw a man run out of the house. He went into the house to see what was wrong." (299).

Petitioner Colletti moved for a mistrial; that being denied, he moved for a severance, which was also denied (299-300).

Reasons For Granting The Writ

1.

The prosecutor's suppression of evidence possibly favorable to petitioners.

Although the law in Illinois does not require that the testimony of witnesses before a grand jury be recorded, Section 112-6, Chap. 38, Ill. Rev. Stat. 1965, *People* v. *Aughinbaugh*, 223 N.E. 2d 117, 120, *People* v. *Derengowski*, 213 N.E. 2d 618, 619, we submit that under the circumstances of the case here and because of a deliberate policy set by the State's Attorney of DuPage County not to preserve grand jury minutes, the defendants' constitutional right to a fair trial in accordance with due process of law was violated.

In advance of trial, the defendants moved for the production of the grand jury minutes of the witnesses whose names were endorsed on the back of the indictment. The assistant State's Attorney announced that, " . . . There was no court reporter present or any tape recording device at the grand jury." (26). The defendants requested a hearing in order to present evidence on the deliberate practice of the State's Attorney not to have court reporters present in order to obstruct defendants from obtaining the grand jury minutes for such use as they might provide defendants. The motion was denied (28). Counsel for defendants then pointed out that since the Appellate Court's decision (*People* v. *French*, *People* v. *Hopf*, 61 Ill. App. 2d 439, 209 N.E. 2d 505, Aug. 4, 1965) that

> "There is a deliberate and steady practice, rule and order of the State's Attorney of DuPage County, not to transcribe the minutes of the grand jury proceedings for the purpose solely and only to frustrate the defense from requesting those grand jury minutes for the purpose of impeachment at the time when defense counsel is entitled to them." (30).

Counsel then made an offer that he was prepared to prove by presentation of evidence that it was such a deliberate practice of the State's Attorney of Du Page County and that the State was withholding evidence needed for the purpose of impeachment. Defense made an offer of proof that, "The County of DuPage, through its State's Attorney, the official prosecuting body, is deliberately obstructing the defendant in having all relevant evidence presented at the trial of the facts under consideration, and we move for a dismissal of the indictment." (34)

There are situations in which deliberately withholding grand jury testimony of a witness violates the defendant's right to full disclosure. The facts and circumstances here markedly point up how the defendants were prejudiced by the deliberate withholding of Mrs. Birdsong's grand jury testimony. Cf. *Brady* v. *Maryland,* 373 U.S. 83 (1963) and *Giles* v. *Maryland,* 386 U.S. 66 (1967), and *Dennis* v. *United States,* 384 U.S. 855 (1966). In *Brady* v. *Maryland,* this Court stated:

> "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." (373 U.S. 87).

The bizarre circumstances of the case here called for a searching inquiry and examination of Mrs. Birdsong's testimony. Her home was burglarized and she was robbed. The question was whether the defendants were the robbers. Mrs. Birdsong testified that money was taken from a living room table and that also missing were a ring and a portable radio (102-113). Guajardo, who was found in the house, had no ring or portable radio on his person (A. 7). Nor was any found in the living room where Guajardo was arrested (204-5). Colletti, who was arrested some distance from the home was immediately searched; no ring or radio was found on his person (196-7). Neither was any found outside the house or in the immediate vicinity (196-7).

It was Guajardo's defense that he was walking by the house and simply went in to see what was wrong when he saw a man run out of the house (299).

In addition, the victim, Mrs. Birdsong, testified that one of the men had on rather large sunglasses (85). Neither of the defendants had sunglasses on them, nor was any pair of sunglasses found in the living room or outside, even though a thorough search was made (351-2). So far as Colletti is concerned, the bills and coins found on him were explainable by virtue of his operating a mobile catering truck which sold sandwiches and coffee to factory and construction workers (203). There was construction going on immediately behind Mrs. Birdsong's home, and about 8 or 10 construction workers were at the scene (240-245).

There were also pronounced discrepancies in the size of the men who were the robbers and of the defendants. Mrs. Birdsong testified one man was taller than the other (85-7); but the defendants were the same height (239).

Under such questionable circumstances as here then, it was extremely vital to know what Mrs. Birdsong said when she appeared before the grand jury with respect to her missing ring and transistor radio. For, if before the grand jury she testified that robbers took her ring and transistor radio, the men had to be other than the defendants. Or at least there could have been an arguable presentation made to the jury — sufficient to cast doubt upon the guilt of the defendants.

Thus, the grand jury testimony of Mrs. Birdsong was vital, not only to ascertain what she reported as lost at the time of the robbery, but what descriptions she gave of the robbers. Although her trial testimony cast doubt upon the identification of the defendants—or at least one of them—as being the robbers (because one robber was taller than the other and both defendants were almost identical in size) it might have proved significant precisely what her description was before the grand jury.

Having demonstrated the nature and extent of the possible impeachment of Mrs. Birdsong had her grand jury minutes been produced, petitioners were prejudiced. Due process of law includes an opportunity to introduce evidence on all issues to be determined. *In re Oliver*, 333 U.S. 257, 273 (1948).

This court should note that peculiar and especial circumstances exist in DuPage County, Illinois. The State's Attorney was cited for contempt for failure to produce Grand Jury minutes in response to an order of court. (*People* v. *Hopf*, 61 Ill.App.2d 439). Although the contempt conviction was reversed because the court held the necessity for production of grand jury minutes was premature, it was then decided by State's Attorney Hopf that his office would affirmatively prevent defendant ever from having access to possible impeachment material.

Under the specific facts of this case, we have demonstrated how vital the grand jury testimony of Mrs. Birdsong was. What she told the grand jury about the theft of her personal property is highly relevant to the case and might have provided considerable material for use on cross examination.

In another context, we submit it is a dangerous practice for the prosecuting official of a county deliberately to prevent any recording or reporting of grand jury testimony. We respectfully suggest that situations will arise whereby the administration of criminal justice will be impeded. How will a prosecutor proceed against witnesses who may recant their sworn grand jury testimony? How will the State's Attorney be able to bring perjury charges against witnesses? These are matters of vital public policy which transcend the particular practices now engaged in by the temporary occupant of the State's Attorney's office in DuPage County, and transcend the limited application of the claimed prejudice to the defendants at bar.

Should the criminal prosecution be a sporting event or a quest for the truth?[2]

Where, as here, there is a showing of the nature and extent of the possible impeachment of which might or could have resulted from an examination of the grand jury proceedings, petitioners were prejudiced in that right.

The Illinois Appellate Court stated that in avoiding preserving grand jury minutes that the State's Attorney's ". . . purpose in doing so may be indeed to avoid the necessity of producing transcripts of Grand Jury testi-

---

[2] See "The Criminal Prosecution: Sporting event or Quest for Truth?" by William J. Brennan, Jr. Washington University Law Quarterly, June, 1963, pp. 279-295.

mony for impeachment purposes at the trial" (App. A, p. 6a). But it ruled that the State's Attorney's motives in failing to preserve Grand Jury testimony was unimportant (App. A, p. 6a).

Deliberate withholding of evidence favorable to a defendant is an important motive in determining the essentials of a fair trial.

2.

Colletti's right to confrontation of witnesses under the Sixth Amendment was violated when his co-defendant's post-arrest statement was permitted in evidence against him over his objections.

In referring to the cross-examination of Chief of Police Kagann by Guajardo's lawyer wherein incriminatory matters against Colletti were elicited over objections by Colletti's counsel, the Appellate Court stated, "Colletti correctly points out that this evidence was improperly admitted" (App. A, p. 3a). Guajardo's post-arrest statement was to the effect that he saw someone run out of the house. That statement was corroborative of other State's witnesses who saw someone run out of the house and saw a policeman chase a man who appeared to be Colletti. Colletti was arrested, but denied he ran out of the house.

The Appellate Court stated, "Here, we would be particularly disposed to reverse the conviction of Colletti if we felt that he had been prejudiced by the hearsay testimony" (App. A, p. 4a). Then the Appellate Court went on to state it could not see how Colletti could be prejudiced by Guarjardo's statement, because it did not see how the jury "could have concluded that Colletti was the person referred to by Guajardo." (App. A, p. 4a). Yet the reviewing court stated that Colletti could not be prejudiced because ". . . the uncontradicted evidence indicates

that Guajardo was already in the house before Colletti ran out." (App. A, p. 4a). The two statements by the court seem to be contradictory.

There was testimony in the record that when Colletti was questioned, he explained the presence of the small change on his person by virtue of the fact that he operated a sandwich and coffee business from a trailer. The police verified that he was so employed by having made telephone calls to his employer (203). There were workmen in the area, as houses were being constructed (240-243).

Thus, Guajardo's testimony corroborated the testimony of Mrs. Erickson and that of Mrs. Dixon, two of the other State's witnesses.

For the court to speculate that the jury would give no consideration to Guajardo's exculpatory statements incriminating Colletti is unrealistic speculation, and is further speculation in a realm about which no one knows. The subtle nuances by which a jury may conclude certain evidence important or otherwise is known only to the subjective processes of jurors.

The Appellate Court distinguished *Bruton* v. *United States,* 391 U.S. 123 because there the prosecution elicited the prejudicial testimony against the co-defendant (App. A, p. 5a). To a prejudiced defendant who moved for severance before the trial, who objected to the testimony during the trial, and who moved for severance during the trial, it makes little difference from which source the tainted and impermissible evidence comes. He becomes prejudiced by virtue of the admittance into evidence, over his objections, of testimony which was contrary to his post-arrest statement to the police.

In *DeLuna* v. *United States,* 5 Cir., 308 F.2d 140 (1962), a conviction was reversed because one defendant's lawyer argued to the jury that although his defendant took the

witness stand, another defendant, DeLuna, did not. And in *DeLuna,* the court even stated that no instruction could undo the prejudicial effect of the reference to DeLuna's silence. We call to the court's attention that here we had asked the trial judge for severance and for a mistrial (299-300). *There was no instruction by the court to disregard the statement as to Colletti.* As *DeLuna* stated in reversing—even though it was not the government prosecutor who injected the prejudicial comments—

> "But considering the head-on collision between the two defendants, the repetition of the comments, and the extended colloquy over the comments between trial judge and the lawyers, the imputation of guilt to DeLuna was magnified to such an extent that it seems unrealistic to think any instruction to the jury could undo the prejudicial effects of the reference to DeLuna's silence. The seed of inference was so well planted, it is fair to assume that it germinated.
>
> In short, for each of the defendants to see the face of Justice they must be tried separately." (pp. 154-155)

This trial was not overly long, two days, including the selection of the jury. The State would not have been unduly burdened had a severance been granted. Justice and fairness demand that he be given that separate trial.

Conclusion

Wherefore, petitioners pray that this court's Writ of Certiorari be granted.

Respectfully submitted,

JULIUS LUCIUS ECHELES
Attorney for petitioner Colletti
JO-ANNE F. WOLFSON
Attorney for petitioner Guajardo